

- ## Findings of Fact

early because of his back. Claimant did not request nor did he seek medical treatment. Claimant remained off work the next two days. When he returned to work on September 11 he was still having symptoms in his low back which continued and gradually worsened.

(2) Claimant continued working until January 1999 when his low back and left leg pain became intolerable and he sought medical treatment from Dr. Dana R. Richman.

(3) Dr. Richman ordered an MRI which was performed in February 1999 which showed a left sided protrusion at the L4-5 level. Thereupon Dr. Richman referred claimant to a neurosurgeon, William M. Shapiro, M.D.

(4) Following the MRI, claimant continued working for respondent but with restrictions against heavy lifting, bending and twisting, until April of 1999. Because claimant was a supervisor, he was able to work within the restrictions recommended by Dr. Richman. Nevertheless, during the time claimant was treating with Dr. Richman his symptoms continued to increase. Claimant denies doing any activities away from work that would cause an increase in his pain. Claimant initially denied doing any home repair, remodeling or construction work and denied lifting or carrying anything that increased his pain. But he later clarified that he did do some remodeling work on his home, but mostly just supervised the work after his fall. His symptoms did worsen, however, from those activities. Claimant said any type of activity caused his pain to worsen, in particular, lifting, twisting or stretching.

(5) Dr. Shapiro performed two surgeries on claimant's back. The first discectomy was in July 1999. A repeat discectomy was performed on July 29, 1999. Claimant did not ask respondent to provide medical treatment until after his first surgery.

(6) Dr. Shapiro released claimant to return to work on October 12, 1999. Claimant was not given any formal restrictions but was instructed to self limit his activities to what he could tolerate. At the time of his release claimant was still having some low back pain and intermittent pain in his left leg but constant pain in the ankle region, however the pain was much less than what he was experiencing before the surgeries. The low back pain is also constant. Claimant now takes over-the-counter medication for the pain and performs exercises prescribed by Dr. Shapiro. Claimant has been unemployed since his release by Dr. Shapiro.

(7) Claimant has been working on an addition to his home for over two years. During the period between September of 1998 and January of 1999, claimant admits doing some work on that project including painting, wallpapering and installing light fixtures. He also assisted with the installation of some carpeting. These activities did cause a worsening of his symptoms. But claimant testified his left leg symptoms started a week or two after his fall and before he did much additional remodeling work at his home. He had not done any lifting or carrying as part of his work at home. Also, before his accident claimant had taken

some odd jobs on his own doing remodeling work, but claimant did not take any jobs after September 8, 1998.

(8) When claimant first saw Dr. Richman on January 22, 1999 he did not relate to Dr. Richman a work-related injury as the cause of his back and leg pain.

(9) Although claimant knew his injury was work related, he did not relate this to the physicians because he intended to pay for his treatment himself. Claimant did this because he liked his job and hoped to continue working for respondent until he retired. He apparently believed that filing a workers compensation claim would somehow jeopardize his relationship with respondent.

(10) Claimant testified that he had no prior low back problems and had never experienced any similar left leg pain before this accident.

(11) Claimant was in a motor vehicle accident on April 1, 1995 and injured his left upper back and shoulder. He was given permanent restrictions of no overhead lifting and no prolonged sitting or standing. Claimant also had a prior back injury working as a machinist for Cross Manufacturing.

Conclusions of Law

(1) An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.² An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.³

(2) After observing claimant testify, Judge Moore found his testimony credible and found that the slip and fall at work, at the very least, aggravated claimant's back condition. Considering both Mr. Pennington's discovery deposition testimony and his testimony at preliminary hearing, the testimony of Mike Morris and the medical records in evidence, the Appeals Board agrees with the conclusion by the ALJ. Therefore, the Appeals Board affirms the finding that claimant sustained personal injury by accident arising out of and in the course of his employment.

¹ Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

² Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

³ Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973).

(3) The Appeals Board further finds that claimant did not sustain an intervening injury. His activities away from work remodeling his home did not permanently worsen his condition.

(4) As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, the Appeals Board affirms the Order dated April 17, 2000, entered by Administrative Law Judge Bruce E. Moore.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

c: Thomas D. Arnhold, Hutchinson, KS
Anton C. Andersen, Kansas City, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

⁴ K.S.A. 1999 Supp. 44-534a(a)(2).